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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for	)	CC Docket No. 93-36
Nondominant Common Carriers	)	

MFS COMMUNICATIONS COMPANY, INC.
COMMENTS ON NOTICE OF PROPOSED RULEMAKING

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Dated: March 29, 1993

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SUMMARY

MFS Communications Company, Inc. ("MFS") urges the Commission to appeal the decision of the United States Court of Appeals for the District of Columbia Circuit, that held unlawful the Commission's forbearance policy, or alternatively, to seek congressional codification of that policy. In the interim, however, MFS strongly supports the Commission's proposal to provide maximum streamlined tariffing requirements for nondominant domestic carriers. The proposed rules achieve compliance with the Court of Appeals Forbearance Decision but minimize the burden of tariffing on nondominant carriers, as well as the Commission.

The Commission adopted its forbearance policy as a means of efficiently allocating its scarce resources. Given the tens of thousands of common carriers subject to Commission regulation, the Commission chose to concentrate its regulatory oversight on the dominant carriers, namely the LECs, who were insusceptible to market pressures. These large and profitable companies, the Commission concluded, have both the incentive and the ability unfairly to discriminate among their captive customers or to cross-subsidize services that are subject to greater competitive pressures with profits from services provided on a monopoly basis. For the nondominant carriers, in contrast, the market provides its own check, precluding the ability for anticompetitive activity. To burden the nondominant carriers with tariffing requirements would tend to stifle the CAP industry, and would thereby reduce the public benefits that it brings through increased competition.

Until the forbearance policy is reinstated, either by appeal or congressional codification, the Commission should approve a form of maximum streamlined regulation that will achieve compliance with the Forbearance Decision while at the same time minimizing the regulatory burden on the nondominant carriers and itself. The Commission's proposed rules achieve precisely this result. The proposed one day notice period allows nondominant carriers, such as CAPs, to respond quickly to competition and prevents the LECs from filing harassing oppositions that would unduly delay the CAP tariffs. Additionally, the maximum streamlined requirements allow the nondominant carriers considerable flexibility in defining their services and setting rates. These rules thus relieve these carriers of the burden of filing constant tariff revisions, which could be

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COMMENTS ON NOTICE OF PROPOSED RULEMAKING

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, hereby submits its comments on the Notice of Proposed Rulemaking ("NPRM")[1/] in this proceeding. MFS, whose nondominant carrier subsidiaries provide competitive access services over fiber ring networks in 14 major metropolitan markets across the country, would be directly affected by the Commission's proposed rules. As discussed below, MFS urges the Commission to adopt without modification the proposed "maximum streamlined" regulations that it has proposed for nondominant carriers.

I. INTRODUCTION

Although the Commission has authority to require tariffing of the rates and charges imposed by all communications common carriers, it decided in the early 1980s in its Competitive Carrier Rulemaking to forbear from enforcing tariffing requirements for

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[1/] Tariff Filing Requirements for Nondominant Carriers, Notice of Proposed Rulemaking, CC Docket No. 93-36, FCC No. 93-103 (released Feb. 19, 1993).

nondominant carriers.[2/] It thereby hoped to focus its regulatory resources on the dominant carriers, namely the local exchange companies ("LECs") and AT&T, which it concluded were not subject to competitive pressures and thus would have an incentive to cross-subsidize or to discriminate unreasonably in the provision of their services. Under the forbearance policy, the nondominant carriers, in contrast, needed little regulatory oversight because their services faced intense competitive pressures, thus ensuring the fairness of their rates. The Commission believed that, for these carriers, the public benefit would be promoted not by regulation, but by minimizing the regulatory burden on their fledgling industries and allowing them to compete.

In November, 1992, the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's forbearance policy, holding that the plain language of the Communications Act requires all carriers, including nondominant ones, to tariff their rates.[3/] Given the compelling nature of the public policy justifications underlying the forbearance policy, the disruption to the industry that has been -- and will continue to be -- caused by the sudden termination of a 10-year-old policy, and the substantial questions of law that remain concerning the Court of Appeals' Forbearance

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[2/] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order, 91 F.C.C.2d 59 (1982); id., Fourth Report and Order, 95 F.C.C.2d 554 (1983).

[3/] AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied (Jan. 21, 1993) ("Forbearance Decision").

Decision,[4/] MFS urges the Commission to seek reinstatement of its forbearance policy through appeal or by congressional codification.

As an interim measure, however, MFS urges the Commission to allow nondominant carriers to file tariffs under the maximum streamlined regulation proposed in its rulemaking. Under the NPRM, the Commission would achieve compliance with the Court of Appeals' mandate in the Forbearance Decision and yet would reduce the burden on competitive access providers ("CAPs"), and other nondominant carriers -- as well as itself -- to a more sensible level. The Commission thus could ensure that the developing CAP industry, whose continued vitality is essential to a competitive telecommunications market, will not be stifled.

II. THE PUBLIC INTEREST WOULD BE PROMOTED BY REINSTATEMENT OF THE COMMISSION'S FORBEARANCE POLICY

Under the Forbearance Decision, all common carriers without exception must file tariffs. The Court of Appeals' interpretation of the Communications Act thus extends the Act's tariffing requirement to tens of thousands of nondominant carriers, many of whom probably are not even aware of the requirement. According to the court, Section 203(a) of the Act requires "every common carrier" to file a schedule of all of its

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[4/] Although the language of Section 203(a) at first blush appears to mandate the tariffing of all common carriers, Section 203(b) allows the Commission to "modify any requirement" of the section "in particular instances" or by general order applicable to special circumstances or conditions. Although the District of Columbia Circuit ruled in the Forbearance Decision that the Commission may not exempt nondominant carriers from the tariffing requirements of section 203(a), the United States Supreme Court has not yet had an opportunity to address this issue.

interstate charges,[5/] and the Commission has no discretion to grant substantive exemptions from this requirement. Under the Act, common carriers is any person who offers interstate or foreign communications services indiscriminately to the public, or to that portion of the public that its system is suited to serve, either by obligation or choice,[6/] including all types of resellers, from nondominant interexchange carriers ("IXCs") to hospitals, hotels and motels that resell telecommunications services to their guests.[7/]

In formulating its forbearance policy, the Commission was particularly mindful to ensure that regulation not place an inordinate burden on the nondominant carriers or the Commission. To start with, of course, there were the potential costs of regulation on the regulated entity -- the administrative costs of complying with regulator demands, the delays required to reflect changes in cost or in market demand in the tariff, and the costs imposed by compelling exposure of confidential data (such as the proposed types and prices of the services that a carrier will offer) to competitors prior to implementation.

It was costs such as these that lead the Commission to propose liberalized regulation for nondominant carriers in the first place. In adopting its forbearance policy, the Commission stressed that tariffing of nondominant carriers would place an unnecessary burden upon the large number of resellers, "particularly . . . the thousands of

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[5/] 47 U.S.C. § 203(a) (1988).

[6/] 47 U.S.C. § 156; NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976).

[7/] Moreover, there is no rational distinction among the various groups of nondominant carriers that would justify placing differing regulatory burdens on them.

hotels and motels desiring to resell long-distance services to their guests."[8/] Indeed, even the LECs bemoaned these very costs and burdens in their call for liberalized regulation of their own services (and in particular their demand for streamlined tariffing requirements to match those proposed -- and then adopted -- for AT&T).[9/] In essence, the LECs seek to impose on nondominant carriers the burden they themselves would prefer to avoid. As discussed below, continued tariff regulation of LECs is justified by

dominate more than 99% of the market for local services, a figure that indicates just how free they are from competitive forces.[10/]

For dominant carriers, the Commission recognized that the LECs would be tempted unfairly to discriminate among their captive customers or to cross-subsidize services that are subject to greater competitive pressures with profits from services provided on a monopoly basis. Without the guiding hand of the market to ensure reasonable rates and charges, the Commission appropriately assumed that burden.

These same considerations counsel a different -- indeed an opposite -- regulatory approach for nondominant carriers. Here, the Commission, after assessing the competitive posture of the market, decided to forbear from enforcing Section 203(a)'s filing requirements. As the Commission has held, the markets faced by nondominant carriers are extremely competitive.[11/] Not only must such carriers compete among themselves, many also are pitted against the dominant LECs. In these circumstances, the market itself ensures against cross-subsidization of services or unreasonably discriminatory arrangements by nondominant carriers.[12/] The market, in essence, is its own policeman, and there is no need for additional Commission oversight (which even under the best of circumstances functions as an imperfect surrogate for market

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[10/] See Connecticut Research, 1992 Alternate Local Transport . . . A Total Industry Report 36 (1992) (the existing market for CAPs is approximately $260 million (and the reachable market approximately $500 million) in a total market of approximately $90 billion).

[11/] 91 F.C.C.2d at 59.

[12/] Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd at 5882.

mechanisms). The Commission further recognized that if it imposed a heavy regulatory burden on these carriers, many of which were small and operating on narrow profit margins, they might be driven from the market entirely. If this happened, the public would lose the benefits that CAPs and other nondominant carriers gradually are bringing to the market through increased competitive pressure.

In sum, the Commission's forbearance policy was a completely fitting resolution of the dilemma posed by the paucity of Commission resources and the vast number of nondominant carriers potentially subject to regulation. MFS accordingly urges the Commission to pursue a writ of certiorari, asking the United States Supreme Court to overturn the Court of Appeals decision, thereby ensuring that its forbearance policy is reinstated. Alternatively, the Commission should petition Congress to codify its forbearance policy. In the Forbearance Decision, the Court of Appeals itself suggested this route, noting that although it did not "quarrel with the Commission's policy objectives," congressional sanction would be necessary.[13/]

III. THE COMMISSION SHOULD ADOPT THE STREAMLINED TARIFFING PROCEDURES IT HAS PROPOSED FOR NONDOMINANT CARRIERS

While the Commission should seek reinstatement of its forbearance policy, MFS also urges it to approve a form of maximum streamlined regulation in the interim that would achieve compliance with the Forbearance Decision, while minimizing the

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[13/] 978 F.2d at 736.

regulatory burden on nondominant carriers. The tariffing rules proposed in the NPRM achieve both of these objectives, and consequently MFS advocates their adoption.

A. Notice

The Communications Act gives the Commission broad discretion in setting the notice period required of carriers. Section 203(b)(2) provides that the Commission may in its discretion and "for good cause shown" modify the tariff notice provision so long as the notice period is not specified to be more than 120 days.[14/] The Commission has exercised this discretion by establishing a one day notice provision, under which CAPs and other nondominant carriers have filed their tariffs.[15/]

Not only does the Commission have the requisite discretion to establish a one-day notice period, but such a notice period would advance the public interest. The rules for nondominant carriers established in the Competitive Carrier proceedings, which would apply in default of the proposed rules, provide for tariff filings on 14 days notice.[16/] As the Commission stressed in the NPRM, the purpose of a 14 day notice period is to give the Commission an opportunity to investigate the lawfulness of tariffs before they become effective. Yet, for nondominant carriers, this authority is

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[14/] Although Section 204 of the Act provides that "the Commission may . . . enter upon a hearing concerning the lawfulness [of a filed tariff]" prior to its effectiveness, this authority is discretionary. Furthermore, analysis of federal precedent under the Interstate Communications Act indicates that a one-day notice period would accord with congressional intent, and thus is within the Commission's authority. Southern Motor Carriers Rate Conference v. United States, 773 F.2d 1561 (11th Cir. 1985).

[15/] Tariff Filing Requirements for Interstate Common Carriers, Report and Order, CC Docket No. 92-13, FCC 92-494 (released Nov. 25, 1992); Proposed Rule § 61.23.

[16/] 47 C.F.R. § 61.58(b).

superfluous. As discussed above, competition ensures that nondominant rates are reasonable, obviating the need for other review mechanisms. Indeed, as an empirical example of the salubrious effects of this market pressure, the Commission has never found it necessary suspend a nondominant carrier's rates and conduct pre-effective review of them.[17/]

Subjecting nondominant carriers to the tariff review process would, moreover, impose substantial costs, which will be avoided under the maximum streamlined rules. Under a fourteen-day notice period, the LECs likely would file harassing oppositions to nondominant carriers' tariffs, thereby seeking to delay the implementation of those tariffs. Such harassment is perfectly illustrated by Bell Atlantic's recent behavior -- Bell Atlantic filed petitions to reject the tariffs of all CAPs operating within its service area after those tariffs took effect. While Bell Atlantic's action was wholly meritless as well as unauthorized under the Commission's rules, the CAPs nevertheless had to expend significant resources to defend against Bell Atlantic's attack.[18/] If the Commission extends the notice period beyond one day, it can reasonably expect to see a considerable escalation of such harassment. LECs, whose legal costs are incorporated into their rate base with guaranteed recovery from monopoly services, have the ability and incentive to deplete CAP resources through nuisance litigation.

[17/] In any case, the Commission's post-effective review procedures provide additional opportunity for review. 47 U.S.C. § 208.

[18/] See, e.g., Opposition to Petitions to Reject (Mar. 8, 1993).

Finally, a one-day notice period allows CAPs to respond quickly to competition. MFS has pioneered technologies such as fiber ring architecture and local area network ("LAN") interconnection at speeds up to 100 Mbps. CAPs will continue to lead in deployment of new technologies and innovative service applications. However, if they are restricted by an unduly lengthy notice period and the fear of harassing litigation in introducing new services, not only will they be harmed, but the public will be denied the benefits of effective competition.

B. Tariff Content Requirements

The Commission proposes to give CAPs and other nondominant carriers broad flexibility in defining services.[19/] It also provides maximum flexibility in ratemaking by approving tariffing of maximum rates or a minimum-maximum range of rates.[20/] These provisions are essential to effective competition, and MFS urges their adoption.

As previously stated, CAPs are highly innovative service providers and thus require latitude in specifying their services and rates. The NPRM provides this flexibility, and thereby relieves nondominant carriers of the burden of filing constant tariff revisions. Such revisions slow the pace of innovation, as well as impose costs of $490 per filing. While these filing costs are nothing to the LECs, who are guaranteed to recover such costs through monopoly service rates, such costs can be significant for the CAPs, and could further stifle their innovation. In its NPRM, the Commission

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[19/] NPRM, para. 21.

[20/] Id. at 22-23.

recognizes that the forbearance policy nourished a competitive marketplace, which stricter tariffing requirements could harm.[21/] MFS agrees and consequently urges the Commission to adopt its proposed rules.

C. Tariff Form Requirements

MFS supports the Commission's efforts to simplify the tariff filing requirements. In its NPRM, the Commission proposes to require nondominant carriers to file tariffs and updates on floppy diskettes (with updates integrated into the complete tariff), which would be accompanied by a cover letter in a form of the carrier's choice.[22/] MFS supports these proposed rules that would give nondominant carriers added flexibility in meeting their tariffing requirement, while reasonably minimizing the costs of compliance with the Commission's rules.

IV. CONCLUSION

The Commission should petition the United States Supreme Court for a writ of certiorari, asking it to reverse the Forbearance Decision. Alternatively, the Commission should seek congressional codification of its forbearance policy. In the

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[21/] Id. at 10-11.

[22/] Id. at 24-26.

interim, however, the Commission should adopt without modifications the tariff filing requirements proposed in its NPRM.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March 1993, copies of the foregoing MFS COMMUNICATIONS COMPANY, INC. COMMENTS ON NOTICE OF PROPOSED RULEMAKING were served via hand-delivery to the parties below:

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